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In The
Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,

Petitioners,

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS MARSHALL K. FLOWERS AND ANNA FLOWERS' REPLY BRIEF TO RESPONDENT FORT JACKSON FEDERAL CREDIT UNION

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REPLY BRIEF FOR THE PETITIONERS

I. Statutory Scheme

Under the RFPA, a government authority may not obtain a bank customer's financial records unless the records are reasonably described and 1) the customer has authorized the disclosure; 2) the disclosure is in response to an administrative summons; 3) the disclosure is pursuant to a search warrant; 4) the disclosure is in response to a judicial subpoena; or 5) the disclosure is in response to a formal written request. See 12 U.S.C. § 3402. However, 12 U.S.C. §§ 3413(e) and (1) provide for exceptions to the disclosure requirements of § 3402 when the records sought are in connection with litigation between the government and the bank customer, or when the records are sought under a subpoena or court order issued in connection with judicial proceeding.

Respondent Fort Jackson Federal Credit Union ("FJFCU") defense under the statutory scheme as it pertains to 12 U.S.C.§ 3413(e) is non-applicable and if accepted set a dangerous precedents for financial institutions' scope of liability and stage unaccountability pursuant to law. Disregarding the plain statutory text, FJFCU sought to capitalize on its standing with the Army, chance its violation and accountability to the law, placing its own interest above that of the service member. The standards and procedures prescribe by the RFPA that both the financial institution and Government authority must follow when subpoenaing and releasing customer's records must be enforceable and all accountable to wording of the law. See RFPA 3401et. Seq. Pet. App. 98a-113a

Respondent FJFCU's defense for releasing Petitioners financial records to the Army is a classical example the credit union's non-training and failures to establish RFPA safeguards into its management activities. Now the question is of accountability. Should FJFCU be exempt from RFPA liability pursuant to § 3413(e) for its procedural flaws in acceptance of a subpoena and releasing the Flowers financial records based upon a faxed unauthorized subpoena? The answer invariably is in the

negative. The basis for FJFCU defense cannot rest upon a scheme that discriminately chips away accountability. The Court should not accept FJFCU ignorance of the law. The exception clause 12 U.S.C. § 3413(e) states:

> Nothing in this title shall apply when financial records are sought by a government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties. (emphasis added)

This exception cannot become fuel (exceptions) for vehicles (banks and credit unions) that drive violators to crash with the law. Though military law comes under a different set of rules than civilian counterparts, it is no less accountable to promulgated laws and regulations it chooses to implement. The comparable rules of other court (military) with regard to RFPA and subpoenas are found in 32 Code of Federal Regulations ("CFR") §§ 275 and 504 (Pet.App. 114a-118a; 118a-141a)("No access to any financial records will be made before such certification is given")(emphasis added); Manual for Courts-Martial, R.C.M 703 (1995); and Army Regulation ("AR") 190-6- Obtaining Financial Information from Financial Institutions (A certificate of compliance with the Right to Financial Privacy Act of 1978 (App C) will be provided to the financial institution as a prerequisite to obtaining a customers financial records under the following access procedures: © Judicial Subpoenas (para 2-5)(emphasis added) Pet. App. 142a-161a.

Most importantly though nonapplicable here, FJFCU looks to and cites the Ninth Circuit's four part test for determining exception under of 12U.S.C. 3413(e) as the court outlined in Flowers v. First Hawaiian Bank, 295 F.3d 966, 971 (9th Cir. 2002). If this Court accepts the Ninth Circuit analogy as applicable in the instant petition for certiorari, the four-part test invalidates the Code of Federal Regulation, §§ 275 and 504, Department of Defense Directives 5400.12 and Army regulations setting forth safeguards from invasive and illegal tactics used by the government to obtain service members financial records. The word will requires the

government to provide the financial institution with a certificate of compliance before releasing financial record to the Army, this requirement counters illegal methods construed by the government.

II. Factual Background

Respectfully, Petitioners disagree with respondent description of the events as succinctly summarized by the District Court for the District of Hawaii, in its order Granting In Part and Denying In Part Motions for Summary Judgment (see Pet. App. 63a-69a; CR 443. Rather that submit redundant information in each reply brief, Petitioners factual background is fully described in Petitioners' Reply Brief in response to the U.S. Army.

The undisputed factual background in the complaint is Flowers was detained for an alleged shoplifting at the Schofield Exchange. Thereafter, the Army through the behaviors and actions of Maj. Ohlweiler engaged in despicable and unacceptable, conduct from investigation of charges, non- judicial punishment, and though charges were unsupported under any standard of rules pursuant to the manual, Maj. Ohlweiler as a last resort use a withdrawn non-judicial punishment (Article 15) as the basis for a bar-to-reenlistment, ultimately as he phased it "to Flowers go away" that eventually force Flowers into retirement.

Most essential to military discipline is fair-play and equitable treatment of service members and strict adherence to the principles of law. Rule 109 of the Manual for Courts-Martial unequivocally states that:

> Each judge advocate is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with the rules of this manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violation

of such rules. Sanctions may include but are not limited to indefinite suspension from practice in court-martials..."

FJFCU's brief does legitimately defend nor provide any law, statutory or precedents why this Court should not review the Right to Financial Privacy Act and determine whether summary judgment is appropriate in this case, absent their ability to conduct discovery, denial of their Federal Rules of Civil Procedure, Rule 56(f) motion, and clarification of whether the RFPA is barred by Feres and whether its enforcement mechanism interferes with military discipline? Rather instead, respondents ask this Court to punish petitioners for attempting to execute the penalty provision for its violations of the RFPA that contributed to, if not cause Flowers' dismissal from the Army.

FJFCU had the ball (law on its side, "get a certificate of compliance") fumbled it (violated the law) and now ask management (this Honorable Court) for a contract extension (exception § 3413(e)).

III. Petitioners Statement of Procedural Background

Procedurally, Petitioners were continuously denied due process in litigating their claims against the powerful defendants with resources, positions, and compromise of standards not condoned by the standards the judiciary expects from its officers. First, the Army had twofold interest in barring Flowers from reenlistment 1) for Maj. Ohlweiler' violation of the RFPA and retaliation for the civil suit filed against First Hawaiian Bank, and 2) to deny a court-martial and due process. It was not about military discipline, it was utilization of status, positions, to underscore the violation of rights afforded pursuant to our Constitution of these United States that the Army though Flowers was worthy to defend however, deprive Flowers from utilizing that right, that in violation of the Fourteenth Amendment.

FJFCU mistakenly states that "[o]n April 24, 2003, the Flowers jointly filed the second Consolidated Amended Complaint ...[.] (CR 222) 'This was the first time Mrs. Flowers had properly

brought suit against FJFCU.'" Petitioners Second Consolidated Amended Complaint was filed by Petitioner's counsel, Charles R. Brown on March 28, 2003 (CR 211)

Additionally, FJFCU's response brief ("Br. Resp. FJ) incorrectly states that "[t]he Article 15 hearing was held on August 28, 1998. 'Flowers and military defense counsel attended.'" Br. Resp. FJ at 9. Pursuant to military regulation, Flowers was assigned Individual Military Counsel, Maj. Denise Lind ("Maj. Lind") who departed Hawaii for graduate school in mid-July 1998. Flowers consented to no other military representation in the case except consent to have Capt. Donna M. Bovina as assistance defense counsel. However, her presence did not exist at the Article 32 hearing.

IV. Petitioners' Counter Argument

FJFCU refers to Rule 10 of the Supreme Court Rules stating "it is clear that the Flowers have not raised issues of character necessary for review by the United States Supreme Court. Clearly, Flowers raised eleven questions before the Ninth Circuit Court of Appeal that the Court mostly dismissed as without merit. Pet. App. 1a-7a.

The Court of Appeal decided the Issues of Feres, which advertently prohibited discovery and restricted the Flowers ability to litigate their claims. See Feres v. United States, 340 U.S. 135 (1990).

Collectively, the defendants capitalized on Maj. Ohlweiler's positions as SAUSA and created disarray for petitioners by ignoring compliance with Rule 26 of the Federal Rule if Civil Procedure, particularly with regard to initial disclosures that requires a party without awaiting a discovery request, provide to other parties: (A) the names and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleading, identifying the subjects of the information; (B) A copy of, or a description by category of all documents, data compilation, and tangible things in possession, custody, or control of the party that are relevant to disputed facts alleged with

particularity in the pleading. FRCP, Rule 26.

The adversary system provides both sides in litigation with opportunity to present facts and evidence in support of their claim and based upon those facts and evidence, the court can render its decision. Facts and evidence are acquired through discovery. Feres deprived Petitioners of the right to obtain facts and evidence with regard to defendants' violations of the RFPA. Petitioners requested discovery as early as November 27, 2002 which the court denied (CR 101/124) See also Fort Jackson Amended disclosure [CR 295/317]. Although, the Government deposed Anna and Flowers for eight and twelve hours on April 27, 2003 and May 29, 2003 respectively, the government and defendant financial institutions thwarted and manipulated the discovery process and used the court as its vehicle to drive "Flowers away" .

Petitioners' litigation the U.S. District Court for District of Hawaii spelled disaster for Petitioners- particularly pro-se after the Ninth Circuit Court decision in Flowers v. First Hawaiian Bank, 295 F.3d 995 (9th Cir. 2002). The rules of law were not equitable. The eleven questions petitioners proposed to the appeals Court could not be presented to this court in a short petition for certiorari. Additionally and respectfully, the Department of Justice appeared to improperly influence the selection and assignment of Petitioners appeal to a favorable panel. Nevertheless, the decision conflicts with law and decisions of other courts. Indeed higher echelon personnel engaged in behavior unacceptable to this Court. Respectfully, the Ninth Circuit states "[t]he record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. The record establishes that the credit union is not liable under the RFPA because the subpoena issued to the credit union satisfies an exception to liability under 12 U.S.C. 3413(e). Pet. App. 5a

IV. The Ninth Circuit Court Four Part Test is non-applicable to events and unlawful subpoena in the instant appeal.

Respectfully, the Ninth Circuit Court decision incorrectly applied its application of the four-part test to the subpoena issued

FJFCU in this case. The court stated "[t]he four part test all of which must be met to apply; the applicable financial records must be (1)sought by a government authority, (2) under the Federal Rules of civil or Criminal Procedure or comparable rules of other courts, (3) in connection with litigation, (4) to which the governmental authority and the customer are parties

In applying the four-part test to the subpoena issued by Maj. Ohlweiler, the only shoe that fits is 1) Maj. Ohlweiler, a military officer meets the definition of "Government authority." The other three of the four-part test are non-applicable and absent to FJFCU's defense. Particularly for reasons as followed:

(2) under the Federal Rules of civil or Criminal Procedure or comparable rules of other courts. This part cannot apply since the Maj. Ohlweiler was absent authority to issue a subpoena. see 32 CFR, part 504.2(c) ("The Army has no authority to issue administrative summons or subpoena for access for financial records");see also R.C.M.703 © ("A subpoena may be issued by the summary court-martial to secure witnesses or evidence for that court-martial") (3) in connection with litigation: Blacks Law define "Litigation" a lawsuit, legal action, including all proceeding therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law- this part definitely cannot meet the criteria since a court-martial was not convened pursuant to Rule 601 (Referral of charges I the order of a convening authority that charges against an accused will be tried by a specified court-martial. Rule 601 see also 601 discussion ("Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and ©; preferred charges which have been received by the convening authority for disposition (see R.C.M 307 as to the preferral of charges and chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (see R.C.M. 504); (4) to which he governmental authority and the customer are parties: the investigative stage of a proceeding between an accused and the government absent a case, controversy, or lawsuit in a Court is absent.

The second question remains "[h]ow was Fort Jackson Federal Credit Union, located on a military base in South Carolina to know that a subpoena issued from Hawaii to its credit union is facially valid"? Respondent argues "[f]acially,...the[FJFCU] subpoena was one that fits within the exception [to the RFPA]. There was no way Fort Jackson FCU would have, or should have, known that the underlying proceeding had not yet reached a court-martial stage. As a customer of FJFCU for years, an attempt over the telephone for Flowers withdraw funds from either accounts required answer to questions, mother's maiden name, social security number and other security measures before funds or information. Of course, security measures are enacted or should be enacted to protect both the bank nd the customer's interest. Nevertheless, security measures are implemented.

FJFCU did not request a certificate on compliance nor waited for the 10-14 days as required before providing financial records. See § 3410. Instead, Ms. Jones, an executive secretary in the management division "acted on a faxed copy."

While Petitioners objected to FJFCU's counsel, Mr. Jeffere Juliano representation of all FJFCU employees (witnesses), the following transpired at the deposition of Ms. Velma Jones.

In a sworn deposition to Petitioner's questioned Ms. Velma Jones answered as follows:

Q. So that there is no record custodian, as you testified today?

A. Not that I know of, no

Q. During the period of June 1998, you received a subpoena; is that correct"

A. Yes.

Q. And who did you receive the subpoena from?

A. Captain Ohlweiler?

A. How did you come to know Captain Ohlweiler?
Q. To know him, I received a telephone call from him stating that he had a subpoena for records of your account.

Q. Yes. And go on.
A. You asked me how--

Mr. Juliano: Wait, objection. Ms. Jones, I don't want you to just keep going, answering his question. Answer the question. Ms. Jones, if you have finished answering his question, then tell him you've finished answering his question. He's just going to ask you to go on. There is no question pending, so I object to the form of the question. There is no question pending

Mr.Flowers: Mr. Juliano

Mr. Juliano: I don't want you to get into just a broad--

Mr. Juliano: Ask your question. I just don't want you asking broad-
By Mr. Flowers

Q. Okay. And you indicate, in your last remark you indicated that he gave you a telephone call and he requested financial records for who?
A. Marshall K. Flowers

Q. And in requesting those financial records, did he indicate why he wanted those financial records?
A. That it was for a court martial

Q. And he indicated it was for a court martial and what was your response?
A. I responded to him as I would normally with anyone requesting a subpoena, and that would be that I would normally require the original subpoena before I can release any document. However, he indiated that it was--needed as soon as possible, and I would act on a fax copy if he sent that to me.

Q. And when did you receive--did you receive the subpoena when he--you indicated you receive a faxed copy?

A. Yes

Q. Is that your testimony?
A. Yes. I received a fax copy, but, as I said, I would normally wait until I received the original subpoena. But because he did say that it was due as soon as possible, I would accept a fax copy and I would prepare the documents to send out. And not having any problems with the Army ever sending an original to me, I acted on the copy, or the fax, I'm sorry. (emphasis added) CR 423

Further Ms. Jones testified that Flowers financial records were placed in regular mail. Though strange as it seems, Maj. Ohlweiler needed the records in a hurry but Ms. Jones as alleged sent the records regular mail. FJFCU compromised discovery be failing to provide proper document[1] Ms. Jones did not sign the subpoena or deliver records as ordered by the subpoena, nor render fees for copying. Fort Jackson allegedly certified copies were not properly certified or notarized. In other words the only notary's signature (Kenneth Credicos) signature appeared with words "[m]y commission Expires May 12, 2003." Noteworthy, the notary is not in accordance with laws of the state of South Carolina. Maj. Ohlweiler alleged letter attached to the subpoena (Rule 703(d) governs service of a subpoena)[2] states "while I need certified, hard copies of the records, if it is possible, I would appreciate if you could fax the paperwork to me as well." CR 432.
R.C.M. 703(D) discussion, addressing informal and formal service states:

> Informal service- *unless formal service is advisable, the person who issued the subpoena may mail it to the witness*

---

[1] Purusant to a discovery request FJFCU provided bate stamped (J00040-44) copies of Flowers' financial statements rather than allegedly certified copies of record Flowers found in the binder at the second Article 32 hearing on or about November 25, 1998. CR 423. Additionally, FJFCU compromised responses to interrogatories with failing to "Identify" Kenneth Credicos. See allegedly certified records, Exhibit "D" at CR 423.

[2] Service shall be made by delivering a copy of the subpoena to the person named and be tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned. R.C.M. 703 (D)

in duplication, enclosing a postage-paid envelop bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelop provided. The return envelop should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and a voucher for fees and mileage will be delivered to the witness promptly on being discharge from attendance.

Formal service-Formal service is advisable whenever it is anticipate that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. See Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when that person is in the vicinity.

R.C.M. 703(D) Discussion

FJFCU's response brief ("Br. Resp. FJ) argues and relies specifically on §3413(e) as good faith defense for non-compliance with procedures, the subpoena language "a General court-martial of the United States…appointed by MG James T. Hill to provide evidence in the matter of United States v. SGM Marshall K. Flowers…Failure to appear…is punishable by a fine…or custody…" Br. Resp. FJ at 3. It is undisputed the language of the RFPA protects a financial institution's protection from liability when litigants are in court. In spite of that the bank is not exempted from the procedural requirement or ignorance of Army regulation for service of process. The language on face of the subpoena clearly described what the recipient must conform to.

Also undisputed is the document issued Fort Jackson a Department of Defense (DoD) document, DD Form 453 (Aug 84)

titled "[s]ubpoena." [3] The law that governs subpoenas is found in Manual for Courts-Martial, Rule 703- Production of witnesses and evidence.

The unauthorized subpoena allegedly issued FJFCU states as follows:

> The President of the United States, to Velma Jones, Fort Jackson Federal Credit Union you are hereby summoned and required to provide on the 24th day of June, 1998 at OSJA, 25th ID(L)(see attached letter for address) (a General court-martial of the United States)(a court of inquiry), appointed by MG James T. Hill to provide evidence in the matter of United States v. SGM Marshall K. Flowers all bank account information since 1 Jan 97 , to include #58293.
>
> Failure to appear and testify is punishable be a fine of no more than $500.00 or imprisonment for a period not more than six months, or both. 10 U.S.C. 847. Failure to appear may also result in your being taken into custody and brought before the court-martial (_____) under R.C.M. 708(e)(2)(G).
>
> Bring this subpoena with you and do not depart from the proceeding without proper permission.
>
> Subscribed at Schofield Barracks, this 24 day of June 1998.
>
> _____
> John N. Ohlweiler
>
> The witness is hereby requested to sign one copy of this subpoena and to return the signed copy to the

[3] The standard pre-printed DD Form 453 states " failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not more than six months or both. 10 U.S.C § 847.

person serving the subpoena.

I hereby accept service of the above subpoena

_____

Signature of witness

Note: If the witness does not sign, complete the following.

CR at 432 See also AR 27-10, para 5-20 ("A subpoena must be sent certified first class mail, return receipt requested, and restricted delivery may be used for formal service of subpoenas (R.C.M. 703(e)(2) (D) and Discussion")

Despite complying with the subpoena, FJFCU relies heavily upon wording on face of the unauthorized subpoena and states:

> It is irrelevant whether the subpoena was, in fact, issued in the Article 32 proceeding when on its face, the subpoena that is actually issued clearly states that it is pursuant to a "General Court-Martial" ...Since FJFCU's subpoena states on its face that it is a subpoena in a "General Court Martial" , the subpoena does nort invoke non-existent legal authority as the basis for its issuance. In fact, a closer look at the June 24, 1998 subpoena directs the receiver[FJFCU] to look at R.C.M.708(e)(2)(G)" for legal authority regarding this particular subpoena. As indicated above, RCM 708(e)(2)(G)" clearly provides that asubpoena may be issued by a court-martial. Therefore, FJFCU had legal authority and a basis for responding to the subpoena

Sound good, but lacking substance since service of process, on the face of the subpoena, states: [t]he witness is requested to sign one copy of the subpoena and return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena

_____

Signature of witness

See subpoena DD form 453. CR 372

Respectfully to counsel their argument is not only procedurally defective but legally defective as well, an argument without merit and unpersuasive. FJFCU has the responsibility to establish, train, and implement RFPA safeguards to protect customer records in compliance with the law, advance measures FJFCU should have employed prior to this learning- through consequences.

In Petitioners opposition to FJFCU motion for summary judgment argues "there is no record of service of process that recorded the date the subpoena was served nor an official record of transmission...the method of service was unauthorized and record of transmission by fax not officially recorded. CR 422. The Government in its Amicus Brief to the Ninth Circuit court conceded the rules of Courts-martial "do not authorize a subpoena to produce documents except in conjunction with a witness appearance." (emphasis added) CR 423, App. J. While the rule provides for an inspection "at an earlier time" than the Court-martial trial, the authorization does not extend to the period before charges have been referred for court martial following completion of the investigation. Id.

Prior to and up to the date of the Article 32 hearing, Flowers was unaware Maj. Ohlweiler had issued unauthorized subpoenas for bank records, the two female civilian witnesses stood out since all attendees were in military uniform with the exception of Mr. Gittins. Maj. Lind certainly was aware of Maj. Ohlweiler's subpoena actions but failed to share information with Flowers. See Affidavit of Marshall K. Flowers in Oppos. To FJFCU motion for summary judgment ("[a]t the hearing, I overheard Maj. Lind say to either Charles Gittins or Capt. Graf "the financial records of SGM Flowers may reveal damaging information.") CR 425

Flowers is certain civilian bank representatives were in

attendance at the hearing noting Capt. Ohlweiler specific reference to Capt. Bagwell's arrival which demonstrated appearance of a court-martial to civilian unaware of the military justice system but complying with job instructions.("1034 the government requested the that CPT. Bagwell a Asst. trial counsel has arrived"). CR 372

In Flowers v. First Hawaiian Bank the court in its opinion expressed compassion for the "busy bank officer unschooled in military or federal law, examining the face of a subpoena would have difficulty deciding whether it was issued under the Federal Rules of Civil Procedure or comparable rules of other courts. 'All [the bank] had to do was obtain a certificate of compliance to the RFPA.' " Flowers v. First Hawaiian Bank, 295 F.3d 966, 975 (9th Cir. 2002). Here in the instant appeal, both financial institutions are located on military installations and comply with military rules, particularly in banking businesses. Perhaps the Court reasoning could be extended to the not so experienced bank employee unaware of the RFPA.

A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with applicable provisions of the chapter. See 12 U.S.C. 3403(b) Pet. App. 101a; see also 32 CFR, part 504.2(k)("A certificate of compliance with the Right to Financial Privacy Act of 1978 (app.c) will be provided to the financial institution as a prerequisite to obtaining access to financial records under the following access to financial records under the following access procedures: ...(3) Judicial subpoenas (504.2(e). See also AR 190-6, para 2-11 that echos the same language from 32CFR, part 504.2(k).

FJFCU cites the case of Mohammed Ismail, a pro se federal prisoner filed a civil complaint pursuant to the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq. Ismail sued the defendant bank under 12 U.S.C. § 3417 alleging the bank violated his rights under the RFPA by improperly releasing his financial records to the Drug Enforcement Administration (DEA). The documents released were ultimately used to convict Ismail of

conspiracy to import heroin. The bank responded by stating that the RFPA was not violated because Ismail's records were only released pursuant to judicial subpoenas. The district court granted the defendant's motion for summary judgment finding that Ismail had not shown a genuine issue of fact regarding whether the RFPA was violated. On appeal, Ismail argues: 1) the subpoenas issued were unenforceable because they were issued without judicial approval; 2) the bank did not notify him that his financial records had been subpoenaed; and 3) the bank did not comply with 12 U.S.C. § 3420 which requires that the financial records obtained "shall be returned and actually presented to the grand jury".

The Ismail case bears no similarity to the Flowers case, Ismail alleged the defendant violated the RFPA by disclosing his financial records to the DEA prior to the issuance of the July 7, 1983 grand jury subpoena. Defendant's motion for summary judgment countered Ismail allegation with affidavits of DEA agent Richard Robins and Ivan Vander Kolk, vice-president of defendant bank. Both Robins and Vander Kolk stated that Ismail's financial records were only released after the bank received the July 7, 1983 grand jury subpoena. (emphasis added) Ismail responded by stating that the bank cooperated with the DEA prior to issuance of the subpoena. Ismail does not, however, support his allegation by any documentary evidence. The Court concluded that Ismail did not sustain his burden of producing evidence of a genuine issue of material fact for trial. See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986); Davis v. Robbs, 794 F.2d 1129, 1130 (6th Cir.), cert. denied, 479 U.S. 992 (1986).

The Ismail Court found that the "subpoenas were issued by the court upon application by a U.S. attorney." Further, the decision stated " even if the subpoenas were somehow defective, the bank would still not be civilly liable if there was a good faith reliance on the subpoenas." See 12 U.S.C. § 3417(c). Also, under 12 U.S.C. § 3413(1), a financial institution is not required to notify its customer of the existence of a grand jury subpoena.

See Ismail v. Old Kent Bank & Trust Co., 893 F.2d 1334 (6th Cir.1990), certiorari denied, 493 U.S.962 (1990).

The subpoenas issued were unauthorized. According to Velma Jones deposition testimony her only training received pertaining to the Right to Financial to Privacy Act was "on the job training," basically learn as you go and through consequences as FJFCU seeks to renew its contract (seek the exception). See §3413 Clearly, the Credit union cannot be described as "the busy bank officer, unschooled in military or federal law as the Ninth Circuit Court referred to in Flowers v. First Hawaiian Bank. See Flowers, 295 F.3d at 975 (9th Cir. 2002).

This is not simply a matter where not only a particular rule was ignored but lack of training and Ms. Velma Jones release of financial records minus acceptance of process by signing and returning the Subpoena to Maj. Ohlweiler. Therefore absent service of process pursuant to rules of the court, FJFCU is a free agent (no exception and accountable to the law).

V. The Government and Defendants use of Feres as a conspiracy to deny discovery and "make Flowers go away.

Early July 2003 Flowers informed Attorney Charles R. Brown of a Court hearing in he First Circuit Court scheduled for either the 20-21 July 2003 and Petitioners would like to attend any and all depositions, particularly, when Mr. Brown fees increased each month and defendant sought to complicate discovery through failing to provided names and address of witnesses, protective orders to prevent petitioners pro se from interviewing bank employees, Maj. Ohlweiler presence and assignment in Hawaii as SAUSA, District of Hawaii whose deposition could have taken place but for the failure to comply with discovery. Maj. Timothy Ryan was also in Hawaii whose names and address were identified as a potential witness except for defendant disregard for the rules.

Each deposition to include spouse Anna Flowers, the Government conspired with Charles R. Brown to exclude Flowers.

Since December 1997, the lower court had prevented Petitioners from conducting discovery. Absent any doubt, Plaintiff were prevented from litigating through deceitful measures employed by combined efforts of defendants. As important information facts

regarding liability were provided Attorney Charles R. Brown, he sought a new contract to capitalize on this case, shared attorney-client information with defendant for self interest and compromised the litigation. Evidence of Mr. Brown's ethical violations are memorialized in two-volume of Hawaii Supreme Court, Office of Disciplinary Counsel that warranted and caused his suspension from the practice of law in March 2006 was warranted not only by Petitioners' claim but other as well is memorialized in two volume of record of misconduct.

On June 21, 2003 during the deposition of MG Hill the questions were put before regarding the appeal

Q. General Hill, why did you deny the appeal?
A. I denied the appeal because the original charges were sufficient to warrant the Article 15. In accepting the Article 15, he acknowledged guilt in the matter and accepted the punishment meeted out by the authority in this case, Col. Coleman. And what the appeal is for is to say that the punishment is too severe. I felt like the punishment was not severe against these charges

Q Sir, What effect, if any, did any financial records of Mr. Flowers have to do with your decision to approve the Article 15 punishment?
A. None whatsoever

Q. Now, General Hill, it is my understanding that the Army at this point in the proceeding against Mr. Flowers you had lived up to its part of the bargain"
A. We had indeed.

Q. In fact, the Army had dismissed the charges without prejudices against Mr. Flowers
A. We had indeed.

Q. In fact, the Army had pursuant to the agreement issued an Article 15 punishment which we just covered.
A. Correct

Q. Sir, do you know whether or not Mr. Flowers I had ended up--

had, I'm sorry, had lived up to his end of the bargain?
A. He did not

Q. As a result of that, do you know what you instructed your staff to do?
A. We put a bar to re-enlistment on him, we extended him on active duty--as I recall while he worked further appeals, and we initiated another Article 32 because we reconvened the charges.

Q. Okay. And why did you reconvene the charges.
A. Because part of the agreement was that he would accept the Article 32 and retire

Q. you mean accept the Article 15
A. And when he did not retire, then I negated, as I had the legal right to do, I negated the Article 15, initiated an Article 32 to reconvene general court-martial charges against him. CR 377

General Hill deposition testimony under Oath is assumed to be true. Though not subject to cross examination but he negated the Article 15 and started another Article 32 investigation for the purpose of court-martial. The denial of discovery and review of General Hill's deposition expresses the prejudices attributed to petitioners litigating their claims. Flowers has stated throughout the process-the choice was retire or face a court-martial and when Flowers chose to vindicate himself through court-martial, a bar to reenlistment denied due process and when Petitioners sought to litigate their claims that are the result of defendants violations of the RFPA, the defendants cut that short with Feres.

Defendants are not expected to be an adversary against themselves. Nonetheless, it cannot be permissible for them to manipulate independence of the judiciary. Feres as initiated is to deny discovery and absent complete and full discovery of federal defendant petitioners could not adequately respond to summary judgment and as a matter of law and § 3413 (e) exception was incorrectly decided in favor of Fort Jackson Federal Credit Union. The inability of Petitioners to equitable discovery through Feres deprived petitioners and the court with complete facts.

Additionally, petitioners respectfully placed before this court the court award of cost to FJFCU against petitioners, when in absence from the statue, the RFPA does not authorized compensation to the financial institution.

VI. Conclusion

Respectfully, the decision of the lower court granting summary judgment and affirmation by the Ninth Circuit of appeals were in error. Therefore, the United States Supreme Court should deny FJFCU's opposition and grant Petitioners certiorari.

Respectfully submitted

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